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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
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13 XPAYS, INC., a Delaware Corporation,) CASE NO. CV 11-05880 ODW
14) (FFMx)
15) [Assigned to the Honorable Otis D.
16) Wright II, Courtroom 11]
17)
18)
19)
vs.)
DOES 1 through 995,)
Defendants.)

20)
21)
22 **TO ALL INTERESTED PARTIES HEREIN AND TO THEIR RESPECTIVE**
23 **ATTORNEYS OF RECORD:**
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PLAINTIFF'S EX PARTE
APPLICATION TO EXTEND
TIME FOR SERVICE OF THE
COMPLAINT; DECLARATION
OF MICHAEL D. KUZNETSKY
IN SUPPORT;
[PROPOSED] ORDER
Complaint Filed: July 18, 2011
Trial Date: Not Set

NOTICE IS HEREBY GIVEN that, pursuant Federal Rule of Procedure, Rules 4(m) and 6(b)(1)(A), Plaintiff, XPAYS, INC. respectfully applies ex parte for an Order extending the time to serve the Complaint in this matter.

Good cause exists for this ex parte application inasmuch as deadline to serve the defendants is currently November 15, 2011. However, many of the DOE defendants

1 identified in the Complaint are currently known to Plaintiff only by his/her Internet
2 Protocol (“IP”) address. Further discovery is needed to identify said DOE defendants
3 so that Plaintiff may proceed against them in this matter. Specifically, Plaintiff is
4 awaiting the identifying information from many of the DOE defendants in this matter
5 from their respective Internet Service Providers (“ISPs”).

6 Notice of this ex parte application was not given because no defendant has been
7 served in this action.

8 This application is based upon this Notice of Application, the accompanying
9 Memorandum of Points and Authorities, the records and files of this Court, and all other
10 matters of which the Court may take judicial notice.

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12 Dated: October 31, 2011

13 By: /s/ Michael D. Kuznetsky
14 Michael D. Kuznetsky, Attorney for
15 Plaintiff, XPAYS, INC., a Delaware
16 Corporation

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, XPAYS, INC., by and through undersigned counsel, brings this ex parte application for an Order extending the time to serve the Complaint in this matter pursuant to FRCP 4(m) and 6(b)(1)(A).

I.

INTRODUCTION

7 Plaintiff XPAYS, INC. is a Delaware Corporation with its principal place of
8 business in San Francisco County, California. Plaintiff was and is in the business of
9 licensing, marketing and otherwise exploiting adult entertainment motion pictures in
10 various media. In particular, Plaintiff is the owner of rights in the valid registered
11 copyright for the motion picture entitled "Home Video," also known as the "Paris Hilton
12 Sex Tape" (hereinafter referred to as the "Motion Picture"), United States Copyright
13 Registration Number PAu2-780-223.

14 Defendant DOES 1 through 995 are individuals whose true names and addresses
15 are currently unknown to Plaintiff. DOES 1 through 995 have unlawfully reproduced
16 and distributed the Motion Picture on the Internet without authorization from Plaintiff.
17 However, Plaintiff initially could only identify these particular infringers by way of
18 investigation.

19 On July 21, 2011, the Court granted Plaintiff's ex parte application for expedited
20 discovery to allow Plaintiff to subpoena this information. [DE 7].

II.

RELEVANT PROCEDURE HISTORY

23 The Complaint was filed in this matter on July 18, 2011. On July 20, 2011,
24 Plaintiff filed an ex parte application for expedited discovery. [DE 6]. The purpose of
25 this motion was to allow Plaintiff to issue subpoenas to the nine relevant Internet
26 Service Providers (“ISPs”) to obtain the identifying information of each of the DOE
27 defendants. On July 21, 2011, the Court issued an Order granting the ex parte
28 application. [DE 7].

1 Subpoenas were then drafted and sent out for service on each of the nine relevant
2 ISPs in this matter on July 22, 2011. Declaration of Michael D. Kuznetsky (“Kuznetsky
3 Decl.”) ¶ 5. On or about August 1, 2011, Plaintiff’s counsel was contacted by their
4 process server and was informed that a subpoena was rejected by Verizon’s agent for
5 service of process. The reason was that the ISP information on the subpoena did not
6 exactly match the agent’s records. Thereafter, Plaintiff’s counsel undertook further
7 research efforts to ascertain the exact information needed to properly serve the
8 subpoena. On August 1, 2011, a revised subpoena was issued for Verizon. Kuznetsky
9 Decl. ¶ 6. The information used to correctly identify each of the ISPs in the subpoenas
10 was obtained at considerable cost to Plaintiff’s counsel. Kuznetsky Decl. ¶ 7.

11 Plaintiff has entered into agreements with four of the ISPs establishing a time
12 schedule for production of the identifying information for the subpoenaed IP addresses.
13 These agreements were entered into as a compromise between Plaintiff and the ISPs as
14 a matter of judicial economy. The ISPs alleged that production of the subpoenas all at
15 once was allegedly unduly burdensome, and the parties voluntarily sought to resolve this
16 dispute without Court intervention. Such agreements include obtaining the identifying
17 information of approximately 40 to 50 IPs per month per ISP, notwithstanding any
18 motions to quash that may be filed which would delay the release of this information.
19 Kuznetsky Decl. ¶ 8. Based thereon, Plaintiff has yet to receive the identifying
20 information for all DOE defendants in this matter. Kuznetsky Decl. ¶ 9.

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III.

EX PARTE RELIEF IS WARRANTED AND
GOOD CAUSE EXISTS FOR THE COURT TO
EXTEND TIME TO SERVE THE COMPLAINT

5 Pursuant to Fed.R.Civ.P 4(m), the deadline to serve the Complaint is currently
6 November 15, 2011. However, if a plaintiff shows good cause for the failure to timely
7 effect service, “the court *must* extend the time for service for an appropriate period.”
8 Fed.R.Civ.P. 4(m) (emphasis added). Likewise the Court can grant an extension of time
9 for an act to be done within a specified time upon a showing of good cause with or
10 without a motion before the time has expired. Fed.R.Civ.P. 6(b)(1)(A). From the time
11 of filing the Complaint, Plaintiff has made and continues to make reasonable efforts to
12 identify each of the defendants in this matter so that they may be served. However,
13 Plaintiff is still awaiting much of this information. Thus, good cause exists for to extend
14 the time to serve the Complaint. Kuznetsky Decl. ¶¶ 4, 9.

15 Upon the filing of the Complaint, each of the DOE defendants identified in the
16 Complaint were known to Plaintiff only by his/her Internet Protocol (“IP”) address.
17 Accordingly, Plaintiff is currently and diligently attempting to ascertain their identifying
18 information. In particular, Plaintiff has subpoenaed all such identifying information,
19 stipulated to a timeline for the production of such information with the relevant ISPs,
20 and is currently awaiting receipt of all of such identifying information.

21 Plaintiff is currently unable to identify many of the DOE defendants other than
22 by their IP addresses. Further discovery is needed to in order to allow Plaintiff to
23 subpoena information identifying said DOES in order to proceed with the litigation of
24 this matter. Without such information, Plaintiff is unable to serve the Summons and
25 Complaint or in any other way proceed with the litigation of this matter against many
26 of the DOE defendants. The only known means for Plaintiff to identify the DOE
27 defendants is through the subpoenas the Plaintiff has diligently issued.

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1 Courts have recognized that, “[s]ervice of process can pose a special dilemma for
2 plaintiffs in cases like this in which the tortious activity occurred entirely on-line.”
3 *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999).
4 Accordingly, since Plaintiff has shown good cause for the failure to timely effect
5 service, Plaintiff respectfully requests that the Court extend time for service for 90 days
6 pursuant to FRCP 4(m). Likewise, ex parte relief is warranted, as the deadline to serve
7 the Complaint is currently November 15, 2011.

8 **IV.**

9 **CONCLUSION**

10 Based on the foregoing, Plaintiff respectfully requests that the Court issue an
11 Order granting Plaintiff an extension of a ninety (90) days to effect service of the
12 Complaint in this matter pursuant to FRCP 4(m) and 6(b)(1)(A).

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Respectfully Submitted,

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Dated: October 31, 2011

By: /s/ Michael D. Kuznetsky
Michael D. Kuznetsky, Attorney for
Plaintiff, XPAYS, INC., a Delaware
Corporation

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents described as **PLAINTIFF'S EX PARTE APPLICATION TO EXTEND TIME FOR SERVICE; DECLARATION OF MICHAEL D. KUZNETSKY IN SUPPORT; [PROPOSED ORDER]** with the Clerk of the Court for the United States District Court for the Central District of California by using the appellate CM/ECF system on October 31, 2011.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Executed on October 31, 2011, at Toluca Lake, California.

/s/ Michael Kuznetsky
MICHAEL D. KUZNETSKY